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Sec. 416.1, Code of C.P. (text p. 4) 3, 6, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

J. HOWARD ARNOLD — Petitioner

vs.

WILLIAM J. McGUINESS — Respondent

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States of America:

The petition of J. Howard Arnold for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit made and entered by said court after decision in the United States District Court for the Northern District of California, respectfully shows to this Honorable Court:

I

OPINIONS OF THE COURTS BELOW. This is a proceeding to secure review of a District Court judgment order, affirmed on appeal, dis-

missing a damage suit under the Civil Rights Act for failure to state a cause of action on which relief can be granted, under Rule 12(b)(6), Federal Rules of Civil Procedure. The opinion of District Judge Oliver J. Carter, titled 'Memorandum and Order' and filed Feb. 2, 1967, (Record, pp. 27-30) is appended hereto.

Your petitioner's Motion to Alter and Amend was summarily denied prior to hearing by Judge Carter in an 'Order' dated Feb. 24, 1967 (Record, pp. 38-39), also appended hereto.

On appeal, the U.S. Court of Appeals for the Ninth Circuit on August 5, 1968, affirmed the District Court order, virtually without opinion; its 5-line order is appended.

Your petitioner's request for rehearing was denied without opinion on Sept. 23, 1968.

II

JURISDICTIONAL STATEMENT. The statutory provision believed to sustain the jurisdiction of this Court is Paragraph (1) of Section 1254, Title 28, United States Code. The judgment to be reviewed was dated and entered Feb. 2, 1967. The order denying the motion to alter and amend was dated and entered Feb. 24, 1967. Rehearing was denied on Sept. 23, 1968, following decision on appeal Aug. 5, 1968. No extension of time within which to petition for certiorari has been sought or granted.

QUESTIONS PRESENTED FOR REVIEW.

(1) Invoking subject-matter jurisdiction. Is the conferring of jurisdiction of the subject-matter on a State court judge by statute sufficient to clothe him with judicial immunity from civil liability, or must that dormant, potential jurisdiction of the subject-matter first be invoked by filing of a proper complaint before immunity attaches in a particular case?

(2) Does pendency of a prior damage suit by a defendant against a State court judge automatically disqualify that judge for financial interest under Section 170(1), California Code of Civil Procedure, preventing that judge from acquiring jurisdiction of the subject-matter in a contempt proceeding against that defendant, and piercing the judge's cloak of immunity?

(3) Does filing of a motion to quash under Sec. 416.1, California Code of Civil Procedure, suspend the judge's jurisdiction of the subject-matter, if any he had, nullifying his judicial immunity for acts in plain defiance of statute?

(4) Is the judge liable for his wrongful ministerial act of jailing defendant for non-appearance, as Sec. 416.1 prohibits default judgments? Without jurisdiction of the person, can any immunity exist?

IV

STATUTES INVOLVED.

California Code of Civil Procedure, Section 170. Interest, Relationship, Bias or Prejudice. — No justice or judge shall sit or act as such in any action or proceeding:

1. To which he is a party; or in which he is interested other than as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation; .....

5. When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before him.

California Code of Civil Procedure, Sec. 416.1. Motion to Quash Service for Lack of Jurisdiction. — Any defendant or cross-defendant upon whom service of summons has been made may serve and file, on or before the last day on which he is required to plead, or within such further time as the court may for good cause allow, a notice of motion to quash the service of summons, upon the ground of lack of jurisdiction of the court over him. The notice shall designate as the time of making such motion a date not more than 15 days following the

filing of such notice of motion. In the event of the service and filing of such motion, the time of the moving party to plead to the complaint or cross-complaint shall be extended, and no default may be entered against him, until the expiration of 15 days following service upon him of written notice of entry of an order of the court denying the motion. . . . . .

V

STATEMENT OF THE CASE. This is the third of three appeals by petitioner from dismissals under Rule 12(b)(6) by the District Court of damage suits under the Civil Rights Act for false imprisonment, conspiracy, etc. These suits arose during contempt proceedings in the Superior Court of Alameda County, California, growing out of a divorce action by petitioner's wife and effecting the seizure of his debtor's estate (in legal custody of the Federal bankruptcy court in proceedings for an Arrangement with Creditors under Chapter XI) by the State court. The case at bar stems from an improper attempt to try title to said debtor's estate in a contempt proceeding and to deter petitioner by threats of jail from his efforts to regain possession of his estate.

Respondent, already the defendant in the second damage suit and thereby disqualified

for interest under Sec. 170(1) C.C.P. from acting in any case involving petitioner, nevertheless signed an Order to Show Cause directing him to appear in a new contempt proceeding. The complaint (wife's Declaration for O/S/C in re Contempt) was defective in failing to state any facts supporting one of the four essential elements of contempt (making of an order, knowledge of order, ability to comply, failure to comply), i.e. petitioner's ability to comply.

Warner v. Sup. Ct. (1954) 126 Cal. App. 2nd 821

Following service of the doubly void O/S/C, petitioner sought to remove the contempt proceeding to U.S. District Court for hearing, but it was remanded on ground of lack of Federal jurisdiction, despite involvement of a debtor's estate and Superior Court flouting of Federal law. On remand, petitioner moved to quash the service of the O/S/C under Sec. 416.1 C.C.P, and (being aware of Respondent's intention of ignoring the motion to quash, as he had done in a prior proceeding) did not appear at the scheduled hearing.

Respondent thereupon issued a bench warrant upon which petitioner was arrested and jailed overnight. Respondent thereafter threatened petitioner with 210 days in jail, insisted on proceeding with the contempt hearing, and refused to honor the quashing statute. Only when petitioner produced an affidavit of disqualifica-

tion (which was not filed) did respondent agree to await action on the motion to quash, which was then granted by another judge, ending the bogus contempt proceeding.

Later, petitioner filed in District Court a civil action for damages against respondent, alleging false imprisonment, conspiracy to deprive of Federal rights, and failure to prevent such conspiracy. Respondent moved to dismiss under Rule 12(b)(6), and District Judge Carter granted the motion, holding that respondent was not disqualified for interest by Sec. 170(1) and that petitioner should have used Sec. 170(5) to disqualify for bias and prejudice but had waived disqualification by not doing so. Judge Carter denied petitioner's motion to alter and amend without waiting for the scheduled hearing, for the stated (and erroneous, by Rule 73(a)) reason that by hearing time it would have been too late to appeal!

The District Court decision was affirmed by the U.S. Court of Appeals for the Ninth Circuit without amplification. Rehearing was then denied, without opinion.

Believing that (1) the law of the case, established largely by implication, is erroneous and at variance with res judicata and stare decisis doctrines, standing in gross conflict with established State and Federal law, and (2) blanket extra-legal immunity has supervened, petitioner asks for further review.

VI

BASIS OF FEDERAL JURISDICTION. This case is a damage suit resulting from violation of petitioner's Federal civil rights. Jurisdiction of the United States District Court is based on Sections 1331 and 1343, Title 28, United States Code; Sections 1981, 1982, 1985, and 1986, Title 42, United States Code; and Sections 27, 110, 711, 712, 742, and 743, Title 11, United States Code.

Jurisdiction of the United States Court of Appeals is based on Section 1291, Title 28, United States Code.

VII

REASONS FOR GRANTING THE WRIT.

Few decisions of this Court have dealt with judicial immunity from civil suit for damages resulting from their acts. The 1871 landmark decision in Bradley v. Fisher stands in need of clarification to curb the prevailing tendency of lower courts, State and Federal alike, to dismiss perfunctorily and superficially all damage suits based on liability of judges. The case at bar is an excellent example of the failure of the general rule of judicial immunity based on statutory jurisdiction of the subject-matter alone, in situations more complex than that in Bradley v. Fisher.

(1) Invoking of potential jurisdiction. The respondent herein bases his defense on the principle of judicial immunity enunciated in

Bradley v. Fisher (1871) 80 U.S. 335

which makes a judge liable only "in the clear absence of all jurisdiction over the subject-matter". (Record, p. 14). However, the Bradley case dealt only with an invoked jurisdiction, and is not in point here. No decision of this Court appears to have dealt with invoking of jurisdiction as a condition precedent to judicial immunity, but other courts, including the Supreme Court of California, have recognized the principle.

Grove v. Van Duyn (1882) 44 N.J. Law 654

Dusy v. Helm (1881) 56 Cal. 188

DeCourcey v. Cox (1892) 94 Cal. 665

Fkumoto v. Marsh (1900) 130 Cal. 66

Watts v. Gerking (1924) 111 Ore. 641

These cases (quoted in Record, pp. 17-22) show the fallacy in respondent's argument that "all" jurisdiction was not clearly absent and his acts were merely erroneous, not void, and covered by judicial immunity. A reaffirmation of valid law of immunity by this Court at this time is highly desirable.

(2) Disqualification for Interest. Respondent was certainly disqualified under Sec. 170(1),

from sitting in the contempt proceeding against his adversary in the prior damage suit and, by imposing a long jail sentence, effectively ending that damage suit. Respondent had "a direct and immediate interest in the result of the action", which disqualified him.

N. Bloomfield etc. Co. v. Keyser
(1881) 58 Cal. 315

Decisions of the California Supreme Court hold that a judge thus interested has no jurisdiction and his every act in the case is void.

Cadenasso v. Bank of Italy
(1932) 214 Cal. 562

Briggs v. Sup. Ct. (1932) 215 Cal. 336

Such disqualification is absolute, and cannot be waived by action (or inaction) of a party,

Mayo v. Beber (1960) 177Cal. App. 2nd 544

nor does it require any affidavit or determination.

Giometti v. Etienne (1934) 219 Cal. 687

(Cadenasso, Briggs, Giometti quoted: Record p.25)

Under California jurisdictional law, respondent is plainly liable for damages. This Court should require the lower Federal courts to honor this 1872 statute, not ignore it.

(3) Loss of Jurisdiction Pending Quashing.

Section 416.1, California Code of Civil Procedure, a 1955 statute, has been held valid by the California Supreme Court,

Hartford v. Sup. Ct. (1956) 47 Cal. 2nd 447

It applies to an order to show cause in a contempt proceeding,

Grant v. Sup. Ct. (1963) 214 Cal.App. 2nd 15

Did respondent have power to proceed, with full judicial immunity, in open defiance of the quashing statute? Chief Judge George E. Harris and Judge Oliver J. Carter have held that he does -- but only by implication. A forthright decision by this Court is needed to settle the question of judicial immunity after a motion to quash has suspended subject-matter jurisdiction.

(4) Judicial Liability and Jurisdiction of the Person. A defective affidavit fails to give a court jurisdiction of the person of defendant,

Pennell v. Sup.Ct. (1927) 87 Cal.App. 375,377

making the contempt judgment void

Pomeranz v. Class (1927)

82 Colo. 173, 257 Pac. 1086

and thus creating liability of the judge:

Inos v. Winspear (1861) 18 Cal. 397

Celnar v. Johnston (1933) 134 Cal. App. 166

Both District Court and Court of Appeals failed and refused to consider this aspect of respondent's liability (cf. Record, pp. 22-23), independent of subject-matter jurisdiction, or the aspect of liability for the wrongful ministerial act of commitment to jail. (Record, p. 24).

(5) Supervision of the Courts Below. District Court dismissal under Rule 12(b)(6) is proper if the law is clearly in favor of the defendant, without inferences upholding his immunity; final decision as to jurisdiction should not be made.

Lewis v. Brautigam (1955) 227 Fed. 2nd 124 at 129 (CA, 5th)

Hoffman v. Holden (1959) 268 Fed. 2nd 280 (CA, 9th) (quoted: Record, p. 26)

Elimination of all issues except disqualification for interest on the ground that they were 'decided' in the prior damage suit involves failure to distinguish among res judicata, law of the case doctrine, and issue preclusion,

Southern Ry. Co. v. Clift (1922) 260 U.S. at 319

and ignores superior stare decisis doctrine. Judge Carter's refusal to honor Sec. 170(1), his erroneous insistence that petitioner should have used Sec. 170(5) (and his misquoting of the statute, concealing the need for a general appearance), his hasty denial of the motion to alter and amend, without hearing, all indicate that the District Court is playing cat-and-mouse with your petitioner, instead of administering justice according to law to judge and pro se litigant alike. In the words of the late Justice Jesse W. Carter of the California Supreme Court (father of hearing judge Oliver J. Carter)

the Federal courts, like the State courts, in California are

> ". . .apparently determined that no action for . . false imprisonment . . shall lie against anyone connected with the enforcement of the law."
>
> Coverstone v. Davies (1952)
> 38 Cal. 2nd 315 at 324
>
> White v. Towers (1951)
> 37 Cal. 2nd 727 at 734

Your petitioner has been arbitrarily deprived of his right to a trial on the merits and thus deprived of his day in court.

The three decisions of the United States Court of Appeals for the Ninth Circuit against petitioner in the false imprisonment suits have been perfunctory and frivolous, failing to serve as supervisory restraints on the District Court. In the case at bar, its reference to the Arnold v. Bostick decision -- involving only jurisdiction in rem, not found in the instant case -- indicates that all three decisions rest primarily on an extra-legal doctrine of blanket immunity for all judges in all situations. It is hoped that this Court will express its disapproval of the breakdown of judicial process in California in this field by granting the writ of certiorari. The glaring disagreement between established law and these decisions should be erased.

WHEREFORE, your petitioner prays that there be issued out and under the seal of this Court A SUMMARY VACATING AND REMAND, per curiam, of this clearly erroneous decision; or, in the alternative, a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit, to the end that the judgment of said court may be reviewed and reversed by this Honorable Court, and such further relief given as to this Court may seem proper in the circumstances.

Dated: December 17, 1968.

Respectfully submitted,

J. Howard Arnold

Petitioner

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APPENDIX

(1) District Court opinion filed Feb. 2, 1967.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIF.

J. HOWARD ARNOLD, Plaintiff : No. 46075
v. : Memorandum
WILLIAM J. McGUINESS, Defendant: and Order

Defendant Judge William J. McGuiness has moved this Court for dismissal of this action involving an alleged violation of plaintiff Arnold's civil rights. Many of the issues in this law suit have been raised in the earlier action of Arnold v. McGuiness, Civil No. 43915, which was dismissed by Judge George B. Harris on October 11, 1965. The United States Court of Appeals for the Ninth Circuit affirmed the dismissal without opinion on August 12, 1966, No. 20617, and denied rehearing on September 21, 1966. As to those issues, the doctrine of res judicata applies.

The only new ground which plaintiff raises at this time is the claim that the defendant acted wholly without jurisdiction on the following two occasions: first, on October 8, 1965, the defendant ordered the plaintiff to appear and show why he should not be held in contempt; and secondly, on November 24, 1965, the defendant issued a bench warrant for the

arrest of the plaintiff upon the latter's failure to appear at the scheduled hearing.

Plaintiff maintains that these orders of the defendant were void because the existence of the above cited case of Arnold v. McGuiness in this Court had the effect of disqualifying the defendant from acting as a judge in any proceeding involving the plaintiff. He cites Section 170 of the California Code of Civil Procedure as authority for this proposition.

An examination of that section reveals that there is no provision for the per se disqualification of the defendant for the reasons given by the plaintiff. At the most, the fact that Judge McGuiness was a defendant in a law suit brought by Mr. Arnold would only be a ground for claiming that the Judge was disqualified for bias or prejudice under Section 170(5). However, in the absence of the Judge acting on his own motion, the Code requires that "the party alleging the bias or prejudice of the judge shall present to the court and file with the clerk a written statement objecting to the hearing of such matter before such judge and shall set forth the facts constituting the grounds for disqualification of such judge." (Sec. 170(5)) No such action was taken by Mr. Arnold in that case.

Furthermore, the Code provides that

this motion for disqualification be made at the earliest practicable opportunity. Mr. Arnold had approximately six weeks during which time he could have moved for the disqualification of Judge McGuiness. The only action Arnold took during that time was that on the day before the scheduled hearing he filed a motion to quash which, he alleges, had the effect of depriving the court of jurisdiction and cancelling the hearing. Any claim made by the plaintiff that the motion to quash was an effective substitute for a motion for disqualification must be weighed in light of the fact that the plaintiff knew that this Court had dismissed an action a month earlier in which the effectiveness of the motion to quash procedure had been in issue.

However, the real point here is that for whatever reasons Mr. Arnold now gives for the disqualification of Judge McGuiness in that prior action, he has failed to press this claim at its proper time and in the proper manner. For this reason it is now too late for him to allege that the defendant was disqualified under CCP Section 170. His failure to urge at the earliest practicable opportunity the grounds for disqualification constitutes a waiver. Muller v. Muller, 235 C.A.2nd 341 (1965).

There is no support whatsoever for plaintiff's contention that the fact that the

defendant could have been disqualified deprives his court of jurisdiction to act in matters which are admittedly within the scope of his general jurisdiction. See Sires v. Cole, 320 F. 2nd 877, 879 (9th Cir. 1963); Agnew v. Moody, 330 F. 2nd 868, 870 (9th Cir. 1964).

In light of the fact that Mr. Arnold has filed other civil rights complaints against judges (see Arnold v. Bostick, 339 F. 2nd 879 (9th Cir. 1964), and Arnold v. McGuiness, supra) it is difficult to avoid the conclusion that he is a litigious plaintiff bent on a course of harassing the judiciary. However, each complaint must be weighed individually on its merits, and it is for the reason that this action is totally wanting in merit that defendant's motion for dismissal should be granted.

IT IS ORDERED that plaintiff's action be, and the same is hereby dismissed.

Dated: February 2, 1967.

OLIVER J. CARTER

United States District Judge

(2) District Court opinion filed Feb. 24, 1967.

IN THE UNITED STATES DISTRICT COURT
for the NORTHERN DISTRICT of CALIFORNIA

J. HOWARD ARNOLD, Plaintiff : No. 46075
v. :
WILLIAM J. McGUINESS, Defendant: Order

Plaintiff has asked this Court to alter and amend its order of February 2, 1967, dismissing his action. After a careful examination of plaintiff's petition in support of his motion, this Court believes that the motion should be denied since the grounds offered by plaintiff are inaccurate statements of the law as applied to this case.

Plaintiff has noticed his motion to alter and amend order for hearing on March 6, 1967. The order dismissing his action was filed February 2, 1967. Since this is a civil action any appeal must be taken from the order of dismissal of February 2, 1967, within thirty days from that date in accordance with the provisions of Rule 73(a) of the Federal Rules of Civil Procedure. The hearing date on the motion before the Court is past the time to appeal, and if plaintiff files a notice of appeal this Court is divested of jurisdiction. Therefore, the Court will act on the

motion now so that plaintiff's right to appeal will be preserved.

Accordingly, IT IS ORDERED that plaintiff's motion be, and the same is hereby denied.

Dated: February 24, 1967.

OLIVER J. CARTER
United States District Judge

(3) Appellate Court Opinion of August 5, 1968

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD, Appellant)
vs.) No. 21814
WILLIAM J. McGUINESS, Appellee)

(August 5, 1968)

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: JERTBERG and DUNIWAY, Circuit Judges, and FOLEY, District Judge*

PER CURIAM:

We have carefully considered appeli-

ant's assignments of error and they have no merit. We agree with and adopt the decision of the district court[1]. We also reaffirm this Court's prior decisions, wherein J. Howard Arnold was twice before this Court as the appellant[2].

Affirmed.

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*Roger D. Foley, District of Nevada, sitting by designation.

[1] See unreported Memorandum and Order filed February 2, 1967, Case No. 46075, Arnold v. McGuiness, U.S.D.C. N.D. Calif.

[2] See Arnold v. Bostick, 9 Cir., 1964, 339 F. 2nd 879, cert. den. 382 U.S. 858; unreported Order in Arnold v. McGuiness, 9 Cir., 1966, No. 20617, cert. den. 386 U.S. 996.